APPENDIX A

Opinion of Supreme Court of New Jersey

On appeal from the Division of Tax Appeals in the Department of the Treasury.

Argued September 27 and October 10, 1966. Decided Dec. 18, 1967.

Mr. Nicholas Conover English argued the causes for appellants. (*Messrs. McCarter & English,* attorneys).

Mr. Alan B. Handler, First Assistant Attorney General, argued the causes for respondent. (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by
HALL, J.

The question on these consolidated appeals is whether New Jersey may constitutionally impose its corporation business tax, N.J.S.A. 54:10A-1, *et seq.,* upon motor freight trucking companies conducting an exclusively interstate business in the state, involving, however, substantial local activities and property. Appellants (taxpayers) contend that the case is on all fours with *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573 (1951), which held that a state franchise tax for the privilege of doing business within the state could not be applied to such an enterprise by reason of the commerce clause of the United States Constitution, Art. I, Sec. 8, cl. 3. Respondent (Director) urges that the levy is valid as to

the taxpayers because the basis of our tax is vitally different from that in the Connecticut statute involved in *Spector* and, in any event, subsequent decisions of the United States Supreme Court indicate a less rigid view of the constitutional propriety of subjecting interstate businesses, by means of state taxes of the type of New Jersey's corporation business levy, to their fair share of the costs of state government, in view of the protection and benefits they receive therefrom.

It goes without saying that we fully recognize we are bound by the holdings of the United States Supreme Court as to federal limitations on state taxation of interstate business in the absence of Congressional action. But that court over the years has varied considerably in its approaches in this field. As Mr. Justice Frankfurter commented in *Freeman* v. *Hewit,* 329 U. S. 249, 251-252, 91 L. Ed. 265, 271 (1946):

> "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States.
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> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the par-

ticular cases and as the product of preoccupation with their special facts."

Professor Hellerstein in his survey of the court's changing approaches contained in *State and Local Taxation, Cases and Materials* (2nd Ed. 1961), 158-168, puts it this way:

> "The present posture of the Court is characteristic of its entire history in dealing with Commerce Clause tax issues—the great issues involved reflect sharp differences in approach among the Justices, the leading cases are decided by slim majorities over strong dissent, and both the rationale and holdings are fluid and dynamic, with one decade's minority becoming the next decade's majority, only to be displaced in another decade by a new majority." (At p. 164).

Our obligation is therefore that so well expressed by Judge Learned Hand in his dissenting opinion on an earlier phase of *Spector* in the Court of Appeals for the Second Circuit:

> ". . . I conceive that the measure of [a lower court's] duty is to divine, as best it can, what would be the event of an appeal [to the United States Supreme Court] in the case before it." (*Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 823 (1944)).

The taxes involved are for the years 1946 to 1960, inclusive. The case is here for the second time with respect to appellant Roadway Express, Inc. (Roadway). It first sought to challenge constitutional applicability by an action in lieu of prerogative writ and for a declaratory

judgment. This court affirmed the dismissal of the suit for failure to exhaust administrative remedies through appeal to the Division of Tax Appeals (Division). *Roadway Express, Inc.* v. *Kingsley,* 37 N. J. 136 (1962). Justice Jacobs pointed out that the nature of the challenge called "for careful examination of the true nature of the tax . . . and the detailed facts relating to the properties and activities of [Roadway] within New Jersey", dictating the taking of evidence and the making of factual findings and legal determinations in the first instance by "the administrative officials designated by the Legislature for that purpose". (37 N. J. at 140).

Thereafter the Director, in August 1962, made formal determinations of the taxes asserted to be due as to both taxpayers, who took appeals therefrom to the Division. (We are advised all the taxes so levied were paid under protest). That agency made full findings and conclusions in December 1965, holding the tax validly applicable to the taxpayers and affirming the Director's determinations. The taxpayers' appeals to the Appellate Division, R.R. 4:88-8(a), were certified on our own motion prior to argument there. R.R. 1:10-1.

The basic provision of the New Jersey corporation business tax, adopted by L. 1945, c. 162, reads as follows:

> "*Every domestic or foreign corporation* which is not hereinafter exempted shall pay an *annual franchise tax* for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, *for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in*

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lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act. . . . ." (N.J.S.A. 54:10A-2). (Emphasis added.)

The measure of the tax is allocated net worth (stockholders' book equity) plus, since L. 1958, c. 63, allocated net income (related to taxable income as reported to the federal government, with certain exceptions not here pertinent). N.J.S.A. 54:10A-4(d) and (k) and 5. Allocation in the case of multi-state activities, to determine the amount properly attributable to New Jersey, is computed, in the case of net worth, by application of the greater of either an assets allocation formula or a three-factor (Massachusetts) business allocation formula, and in the case of net income, by use of the business allocation formula. N.J.S.A. 54:10A-5 and 6. The amount of the tax is fixed by applying specified percentages to the allocated figures. As to net worth, the quite nominal rate is, subject to certain minima, 2 mills per dollar on the first $100,000,000 (increased from 8/10 of a mill by L. 1954, c. 88), 4/10 of a mill on the second $100,000,000, 3/10 of a mill on the third $100,000,000 and 2/10 of a mill on all amounts in excess thereof. As to net income, the rate is a flat 1¾%.[1] N.J.S.A. 54:10A-5 and 6. See *United States Steel Corporation* v. *Director, Division of Taxation,* 38 N. J. 533, 539-540 (1962); *F. W. Woolworth Co.* v. *Director of Division of Taxation,* 45 N. J. 466, 473-475 (1965).

It should be noted that the taxpayers do not contend that the tax here is discriminatory against interstate busi-

[1] This has been raised to 3¼% by L. 1966, c. 134.

nesses or that it is an undue burden on interstate commerce. They do not challenge the allocation formulas as unfair as applied to an interstate business like theirs and do not suggest the result of the New Jersey tax is multiple taxation elsewhere. Indeed, they do not at all attack the amount of the taxes determined by the Director.

Turning to the detailed facts of the activities and properties of these taxpayers as developed before the Division, Roadway is a Delaware corporation, having its home office in Akron, Ohio. It succeeded to the business of an Ohio corporation of the same name in 1954. It is engaged in motor carriage of general commodities as a common carrier over a large section of the country, pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission. It has never been authorized, or made application to be authorized, by New Jersey to do business in this state. Conversely, there is nothing to show New Jersey has ever attempted to compel it to obtain such authority or sought to exclude it from carrying on its business here.[2]

Roadway's operations in New Jersey have generally been of the same type during the years involved, although they have steadily expanded in size. Since the evidence below dealt mostly with the picture in 1960, our references will be to that year unless otherwise noted. In

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[2] In this connection it may be mentioned that Roadway had refused to file state tax returns prior to our earlier decision. 37 N. J. 136. The Director had previously proceeded against it, not by an effort to exclude it from the state by a suit for an injunction as the act authorizes (N.J.S.A. 54:10A-20), but by methods of collection of the taxes he assessed out of the corporation's property in the state pursuant to the state tax uniform procedure law, N.J.S.A. 54:48-1, *et seq.*

that year it maintained two terminals in the state serving the New York-New Jersey metropolitan area. The principal one was in Kearny (which in 1959 had replaced a generally similar facility in Hoboken), with a subsidiary one in Bound Brook (since moved to another location). It owned and operated two types of trucking vehicles. One was over-the-road tractor-trailers carrying truckload lots of goods to and from its New Jersey terminals from and to its terminals in other states, as well as, in some instances, direct delivery or pick-up at the customer's place of business. About 100 of these vehicles came into the Kearny terminal in an average week. They were "domiciled" elsewhere and not registered or licensed by New Jersey. The other type was the so-called city fleet of straight trucks, tractors and trailers, more than 60 in number, which were kept at Kearny and registered, licensed and inspected in New Jersey.

The city fleet vehicles picked up freight at a customer's place of business in New Jersey and other parts of the metropolitan area and brought it to the Kearny terminal, where it was unloaded on the dock and then reloaded on an over-the-road unit for shipment out of the state. An inbound shipment was handled in reverse order. The Bound Brook terminal had no dock facilities and freight to and from that depot usually moved in over-the-road truckload trucks, with less than truckload shipments being transported to Kearny for consolidation and interstate shipment from there. In addition, some customers delivered freight to the Kearny terminal by their own vehicles and picked up shipments to them there. In such cases the customer was given an allowance on the total freight charges, which were based on carriage from the shipper's place of business to that of the consignee.

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It is clear that Roadway did not carry freight shipped by a customer located in New Jersey to a destination in the state. All the freight traffic with which the New Jersey terminals were concerned must be said to be interstate in character, despite the fact that some of it was temporarily interrupted in its journey at the Kearny terminal for unloading and reloading.

These New Jersey traffic activities were very substantial in total. In 1960 Roadway's over-the-road vehicles alone travelled over two and a half million miles on state, county and municipal highways here and the total mileage in New Jersey, with the city fleet trucks included, was estimated to have exceeded 11 million miles. In 1958 charges to shippers for freight originating in New Jersey amounted to slightly over $4,000,000 and similar charges for freight delivered here to almost $3,800,000. In 1960, out of total gross revenues from all points amounting to $71,380,000, $5,728,000 was derived from the New Jersey operations. Although the New Jersey figures include revenue from freight collected from or delivered to the whole metropolitan area, the greater portion of the freight originated in New Jersey and all of it was handled in New Jersey at some time during the shipment.

Equally substantial was the physical nature of the Kearny terminal and the personnel activity connected therewith. Roadway built the terminal in 1959 on a 13 acre plot it owned. The total investment was $941,120. There is a two-story office building containing 7,338 square feet of space, a one-story loading and unloading dock building 101 feet wide and 409 feet long, and a one-story service garage 60 feet wide and 99 feet long. Employed there under three management representatives were 6 dispatch-

ers, 3 supervisors in charge of 6 dock foremen who supervised 55 dock employees, an office manager, a claim supervisor and 48 clerical workers, 86 city fleet drivers, 6 garage employees, and a sales manager in charge of 5 salesmen. (The Bound Brook terminal was located on premises rented at $1800 per year and there were only 2 employees at that location).

The Kearny garage repaired and maintained the city fleet. It also serviced and made some repairs on over-the-road vehicles. Local business establishments made emergency major motor repairs to these vehicles on a contractual basis.

The Kearny sales staff was responsible for soliciting business in the entire metropolitan area, each salesman making 50 calls per week using leased passenger cars. The company also mailed flyers to customers, maintained listings in telephone directories in New York and parts of New Jersey and advertised in various trade journals.

Roadway maintained one account in a New Jersey bank. In 1958 the average amount on deposit there was $154,238, representing cash receipts collected in the state. This account was subject to withdrawal only by the home office. New Jersey employees were paid by check on an Akron bank and local purchases, which amounted in 1958 to over $250,000, were paid for by sight drafts issued by New Jersey office employees and accepted by the Akron bank.

Also of significant note is the fact that Roadway has used the New Jersey courts to enforce claims and defend claims against it. It apparently has never contended that it is not doing business in the state for purposes of valid service of process upon it and, again, it seemingly has not been excluded from bringing actions in the state courts as our statutes direct with respect to ordi-

nary foreign corporations not authorized to do business in the state. N.J.S.A. 14:15-3 and 4.

Despite the localized nature of most of these activities, we assume for present purposes they are so intimately connected with the exclusively interstate freight business that, under current law, they are not to be classified separately as intrastate in character for state taxation purposes.

In 1960 Roadway paid local property taxes on the Kearny terminal of $32,044, New Jersey "vehicle taxes" (presumably state registration fees for the city fleet vehicles of $13,473, state taxes on motor fuel purchased in New Jersey of $23,907, "payroll taxes" (presumably the employer's share of unemployment compensation contributions for New Jersey employees) of $18,448 and other state or local taxes of $2,071, amounting in total to $89,943.

The record presented to us disclosed only the corporate business tax determined by the Director for 1960, which was in the amount of $7,334.50.

The business of appellant Pilot Freight Carriers, Inc. (Pilot) was conducted in a manner so similar to that of Roadway that an opposite result was not urged by reason of the few differences that did exist. The Division therefore did not make detailed findings as to it and held that its tax liability was controlled by the decision as to Roadway. It may be noted that Pilot, a North Carolina corporation based in Winston-Salem in that state, did register as a foreign corporation with the New Jersey Secretary of State. Its operations were somewhat smaller, both overall and in New Jersey. It leased its terminal in Moonachie from a closely related foreign corporation, which was licensed to do business in this state

and has regularly paid corporation business tax here, and its vehicles were serviced and repaired at that location by another related corporation, likewise licensed and paying corporation business tax. The Director fixed Pilot's tax liability for 1960 at $266.70.

The nature of the New Jersey corporation business tax must next be considered. It cannot be doubted, as the taxpayers urge and the Director concedes, that the tax is a franchise, *i.e.*, a privilege, impost. The statute so designates it, N.J.S.A. 54:10A-2, the regulations (*Corporation Business Tax Regulations* (1959), p. 5) so describe it, and this court has so stated, albeit in contexts different than here involved and without exploration of its nature and aspects beyond the limited concern in the particular case. *Werner Machine Co.* v. *Director of Division of Taxation*, 17 N. J. 121 (1954), aff'd 350 U. S. 492, 100 L. Ed. 634 (1956); *United States Steel Corporation* v. *Director, Division of Taxation, supra* (38 N. J. 533); *F. W. Woolworth Co.* v. *Director of Division of Taxation, supra* (45 N. J. 466).

In *Werner*, the plaintiff, a New Jersey corporation, contended that the tax, then measured only by net worth, was in essence a tax on the underlying property making up that value and so the tax base could not constitutionally include tax exempt United States government bonds owned by the corporation. It was in this context that we said the tax was not on property, but a *bona fide* annual excise ". . . for the privilege of exercise by the corporation of corporate powers in this State". (17 N. J. at 126-127). The United States Supreme Court, in affirming, accepted this conclusion and held the tax valid despite the inclusion of federal bonds in the determination of net worth. In *United States Steel*, the taxpayer was also

a domestic corporation and the short discussion of the nature and history of the tax as a franchise levy (38 N. J. at 539-540) was set forth only as background to consideration of the question when corporate mergers took place within a certain tax year or years. *Woolworth* involved a New York corporation authorized to do business in New Jersey and engaged in retail store intrastate operations here. The issues were the proper base for computation of net worth and net income allocable to New Jersey and the matter of fair application of the allocation formulas. Our mention of the nature of the tax and the various provisions of the statute (45 N. J. at 473-475) was simply by way of introduction to consideration of those issues. No previous case in this court has had to be concerned with the current question of the constitutional applicability of the tax to a foreign corporation engaged solely in interstate commerce here or consideration of the statutory provisions in relation to such a problem.

The basis of the tax is a broad one and is not, as the taxpayers contend, imposed merely or solely for the privilege of doing business in New Jersey. It is a state tax applying generally to all domestic and foreign corporations, except those exempted by N.J.S.A. 54:10A-3—primarily financial institutions and certain public utilities taxed specially by other acts. It was certainly intended to reach foreign corporations doing an intrastate business, an interstate business, or both, as far as could constitutionally be done, and its disjunctive recital of the various privileges must be considered with the intended overall coverage in mind. It was enacted in 1945 (L. 1945, c. 162), before *Spector* (and not amended since as far as the basis of the tax is concerned) and during the period

when the approach of the United States Supreme Court may be said to have been that of the so-called multiple taxation doctrine. See Hellerstein, *supra*, at pp. 161-163. The privileges taxed, N.J.S.A. 54:10A-2, are stated, as we have indicated, in the alternative and are not confined, as was the Connecticut statute in *Spector*, to that "of carrying on or doing business within the state". (340 U. S. at 603, n. 1, 95 L. Ed. 576). Thus the privilege taxed may also be either that of exercising its corporate franchise within the state, *or* of owning or employing capital or property in the state, *or* of maintaining an office in the state. The last two stated alternatives clearly point particularly to the nexus of localized activity within the state of a nature and extent, as here, where it can realistically be said that state government substantially affords protection and gives benefits to the corporation's enterprise within the state.

Perhaps even more significant is the express "in lieu" feature of the tax—"And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act". N.J.S.A. 54:10A-2. A bit of history is important here. Under the New Jersey tax structure, generally speaking, taxes for municipal, school district and county needs are assessed and collected at the municipal level by an *ad valorem* levy at a local rate on real and personal property within the municipality. These entities further receive revenue by grants or other distributions from the state government which has become increasingly substantial. The state itself also has the power to tax the same property but it has not exercised it for many years. See *East Orange* v. *Palmer*, 47 N. J. 307, 317 (1966). Its

revenues come almost exclusively from a variety of excises. New Jersey has never had a general direct corporate or personal income tax.

Until 1945 the local levy on personal property applied to both tangibles and intangibles of individuals and corporations, including foreign corporations doing business in the state. The statute as to the latter, R.S. 54:4-19, provided that they should "be assessed for the amount of capital usually employed in this state in the doing of such business, and not otherwise taxed as real property or tangible personal property", the assessment to be made in the municipality "where the business is most usually carried on and transacted". In addition, domestic corporations had long been subject to a franchise tax on their capital stock at the state level, R.S. 54:13-1 to 10, inclusive, and after 1937, foreign corporations doing business in the state were also subject to a similar impost, with a provision, as to corporations engaged in multi-state activities, for allocation of the total capital stock on the ratio of the gross income from the business done in the state to the total gross income from its entire business, R.S. 54:32A-1 to 53, inclusive. See *Corporation Business Tax Regulations* (1959), p. 5.

The situation which had developed by 1945 and which led to the adoption of the state corporation business tax by L. 1945, c. 162 (N.J.S.A. 54:10A-1, *et seq.*) is succinctly described in *United States Steel, supra* (38 N. J. at 539):

> "The Corporation Business Tax Act (1945) was adopted because of dissatisfaction with prior law under which intangible property was taxable *ad valorem* at the substantial rates applicable to realty and tangible personalty. While some owners of in-

> tangibles paid at negotiated rates or escaped taxation completely, others were suddenly selected for full taxation, a phenomenon which was dubbed 'tax lightning.' The Legislature accepted the recommendation in the *Report of the Commission on Taxation of Intangible Property* (1945), p. xxii, that the statute be adopted to supersede such taxation of intangibles and as well the then-existing capital stock tax act."

The statute specifically repealed the capital stock tax as to both domestic and foreign corporations, N.J.S.A. 54: 10A-26, and another act, L. 1945, c. 163, adopted at the same time, expressly removed from the general tax law all provisions permitting taxation of intangible personal property, including R.S. 54:4-19.

The net income measure of the tax, as another element in addition to net worth, was inserted by L. 1958, c. 63, pursuant to the recommendation of the *Ninth Report of the Commission on State Tax Policy* (1958). The essential purpose was to provide an increase in the state's revenues. It may be surmised that historical antipathy in New Jersey to an income tax as such led to inclusion of it rather as another element of the franchise tax, although otherwise it has all the attributes of a direct levy on income. There seems to be no question that, if it had been enacted and denominated as a direct corporate income tax, it would have been validly applicable to the taxpayers here by virtue of *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 3 L. Ed. 2d 421 (1959).

We think it is also clear from the recent decisions of the United States Supreme Court that a state corporate

tax may be properly applied to an exclusively interstate business though it be denominated a "franchise" tax. See Note, *Developments—State Taxation,* 75 Harv. L. Rev. 953, 1031-1033 (1962). Constitutional propriety is not to be determined by labels or semantics, but rather by the operating incidence of the particular levy. While a tax basis worded as is New Jersey's has never been passed upon by the nation's highest court, we earnestly believe that the current course of its opinions in the field, as we read them, points to the conclusion that this levy is valid as applied to exclusively interstate business.

Our review of these decisions begins, of course, with *Spector* (340 U. S. 602, 95 L. Ed. 573 (1951)). There the taxpayer conducted an exclusively interstate trucking business in Connecticut in a manner not significantly different from Roadway and Pilot. The taxing statute, previously quoted in significant part, had been construed by the Connecticut Supreme Court of Errors as imposing a tax, measured by allocated net income, on the franchises of domestic and foreign corporations solely for the privilege of carrying on business in the state. Though nondiscriminatory as to interstate commerce, it was said the levy could not rest on any other basis and was not in lieu of any property tax. The majority, speaking through Mr. Justice Burton, held that, since the state court had determined the tax attached solely to the taxpayer's franchise to do interstate business, this "channel" through which Connecticut sought to make interstate commerce pay its way was an unconstitutional one. It specifically said, however, that "[t]he State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." 340 U. S. at 609, 95 L. Ed. at 578.

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Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Douglas, dissented. He urged that the result represented a reinvigoration of old decisions long since enfeebled by later cases, that the majority had rested on a label and that the state had lost because of its failure to use the right tag. He pointed out that it seemed clear the majority would have sustained the tax if the state legislature or its highest court had described the levy as one for the use of highways or in lieu of an *ad valorem* property tax. He failed to see a proper constitutional distinction from the situation where, if some of this taxpayer's same total Connecticut business had been intrastate, the same tax in the same amount would have been upheld. He felt strongly that exclusively interstate commerce could constitutionally be required to pay its way for the facilities and services of the state it necessarily used, that such business received adequate protection where the state levy was fairly apportioned and non-discriminatory, and that there was "no reasonable warrant for cloaking a purely verbal standard with constitutional dignity." 340 U. S. at 614, 95 L. Ed. at 581.

We have made these detailed references to the majority and dissenting points of view in *Spector* because we are convinced that the minority approach has since become the court's general view and that the later decisions demonstrate the case remains authority, at the very most, only in the precise statutory situation there found.

That progression of approach is well indicated by comparing *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757 (1954) (*Railway Express I*) with *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 3 L. Ed. 2d 450 (1959) (*Railway Express II*). In *Railway Express I*, the court struck down a portion of

a Virginia tax statute applying only to express companies. The taxpayer was engaged solely in interstate business in the state. (It was a foreign corporation and under Virginia law such an entity could not exercise intrastate public service powers; a separate Virginia corporation had been organized to conduct its intrastate business). The statute provided for a state property tax on such companies levied on intangible personal property and money (to which no objection was made) and, "for the privilege of doing business in this State", in addition to the property tax, an "annual license tax" upon gross receipts earned in the state "on business passing through, into or out of this State." 347 U. S. at 362, 98 L. Ed. at 761. The majority of the court held that the license tax was no more than a privilege tax that, like the one in *Spector,* could not be applied to an exclusively interstate business. Mr. Justice Clark, again in dissent but now joined by three other members of the court, stated he would uphold the tax on the same grounds he urged in *Spector,* as well as commenting that he thought the tax was acceptable even under the *Spector* rationale, since Virginia's highest court had construed the impost to be an *ad valorem* tax on intangible property.

Thereafter Virginia amended its express company taxing law and the new statute came before the court in *Railway Express II.* The tax was now denominated "a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock", measured by "the gross receipts derived from operations within" Virginia. 358 U. S. at 438, 3 L. Ed. 2d at 454. The tax was sustained and this time Mr. Justice Clark wrote the opinion joined in by six members of the court. One of the other three con-

curred in the result and the remaining two dissented. Stress was laid on the fact that the impost was no longer called a "license tax" laid on the privilege of doing business in Virginia and that it was not a condition precedent to engaging in interstate commerce in the state. The tax was found to be, in harmony with the state Supreme Court's view, one on the taxpayer's intangible property, *i.e.*, its "going concern" value. *Spector* was not mentioned in connection with the substantive features of the tax. Mr. Justice Brennan and Mr. Justice Harlan, in concurring opinions, expressed some reservation as to the property tax thesis. The former indicated the tax was also valid as a fairly apportioned, non-discriminatory levy, consistent with the state's tax structure, requiring the interstate express company "only to pay its share." Mr. Justice Harlan thought the impost was entirely proper as an "in lieu" tax.

We think these two cases demonstrate that while a state, under a literal view of the *Spector* thesis, may not impose a tax upon interstate commerce solely for the privilege of doing that business in a state, a franchise tax may be imposed thereupon if the incidence or basis is a privilege other than engaging in that business as such or when the levy is in lieu of other state taxes which could be validly imposed on exclusively interstate business.

The same day *Railway Express II* was decided, the court handed down its opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra* (358 U. S. 450, 3 L. Ed. 2d 421) of which Mr. Justice Clark was also the author, joined in by five other members. Justices Frankfurter, Whittaker and Stewart dissented. (The opinion actually covered two separate cases from two differ-

ent states, the other being *Williams* v. *Stockham Valves & Fittings, Inc.*, coming up from Georgia. The statutes, corporate activities and questions were substantially the same and so we will refer only to the Minnesota case). At issue was the validity of Minnesota's apportioned, nondiscriminatory direct income tax expressly levied on domestic and foreign corporations whose business within the state consisted exclusively of foreign or interstate commerce or both. The activities and physical connections in the state of the taxpayer, a foreign corporation, were somewhat minimal. It owned nothing therein except some furniture in a small office it rented as headquarters for a secretary and four salesmen, who solicited orders for cement throughout the state. The orders were accepted at the plant in Iowa and all shipments were made from that point directly to the Minnesota customers.

The tax was sustained. The importance of the decision in relation to the problem before us is in what we believe to be the underlying rationale and emphasis, indicating a broader view by a majority of the present court of the propriety of state taxation of interstate commerce than the rather rigid formalism found in *Spector* and *Railway Express I*, despite the fact that the tax involved here was an income and not a privilege tax. That thought is perhaps best expressed in this quotation from the opinion:

> ". . . The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its

> fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only through ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce.' Underwood Typewriter Co. v. Chamberlain, supra (254 US at 119). . . ." (358 U. S. at 461-62, 3 L. Ed. 2d at 429).

The court expressly spoke of *Spector* as not requiring a contrary result because the tax there was imposed for the privilege of doing interstate business within the state, meaning to us, in the light of the overall philosophy of the opinion, that that case is to be confined to its exact situation.[3]

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[3] Shortly after the decision in *Northwestern Cement,* Congress passed P.L. 86-272 (1959), 73 Stat. 555, 15 U.S.C.A. § 381, *et seq.,* denying the states the power to impose taxes on or measured by net income derived within the state from interstate commerce, if the only business activities carried on within the state are the solicitation of orders for sales of tangible personal property and the orders are sent outside the state for approval or rejection and are filled by shipment or delivery from a point outside the state. This very limited prohibition obviously does not apply to the taxpayers in the case at bar. The legislative approach being negative and not positive, we believe no inference may be drawn therefrom as to the power of the states to otherwise tax interstate commerce. This appears to be the view expressed in the report of the Senate Committee handling the legislation. *U. S. Code Congressional and Administrative News,* 86th Congress, First Session (1959) 2548, 2551.

Appendix A

The final recent case to be mentioned is *General Motors Corp.* v. *Washington*, 377 U. S. 436, 12 L. Ed. 2d 430 (1964), where the opinion was also written by Mr. Justice Clark for a five member majority. The decision appears to have bearing on the issue here, not because of its facts, which are complex and differ considerably from those at bar, but rather, again, by reason of the underlying approach the court took. The tax was for the privilege of engaging in business activities within the state measured, as to the particular type of business involved, by the taxpayer's gross wholesale sales of motor vehicles, parts and accessories delivered within the state. General Motors conceded that certain of such sales were taxable, but that others were not because they were wholly in interstate commerce. The court upheld the tax as to all. Though a tax expressly based on the privilege of engaging in business in the state was involved, the court keyed its discussion to the proposition that interstate commerce must pay its just share of the state tax burden and in referring to *Spector*, quoted only that part of the opinion (previously set out herein) which expressed the view that a state is not precluded from imposing taxes upon activities or aspects of interstate business other than the privilege of doing such business. Mr. Justice Clark said that was what Washington sought to do and that the taxpayer had not shown that any of its activities within the state—so enmeshed as they were in local connections that some of them were concededly taxable—were incidents the state could not reach.

On the thesis of the progression of rationale shown by these decisions, viewed in the light of our statutory provisions, we conclude that it is correct to say that the New Jersey corporate business tax, by reason of the alterna-

tive bases set forth in the act, is not imposed upon foreign corporations merely or solely for the privilege of doing interstate business in New Jersey. We think also there is no longer necessarily any conclusive magic in the denomination of a tax as a "franchise" tax or by another label. We believe validity will now be judged, broadly speaking and in the absence of Congressional action, on whether it is a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit. We are of the opinion that the New Jersey tax meets that test as applied to the taxpayers here involved.

It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden. We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here. Since a state may not exclude such a corporation from doing such business within it, it may not exact an impost on the thesis of a condition of entry therein. More technically speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other bases expressed in the statute. The first is that the tax is expressly in lieu of "all other State, county or local taxation upon or measured by intangible personal property" of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. We believe the tax is additionally sustainable as a levy "for the privilege of . . . employing or owning capital or property, or maintaining an office, in this State", if not also "for the privilege of . . . exercising its corporation franchise" here.

N.J.S.A. 54:10A-2. We think such privileges are sufficiently different from that of "doing" interstate business so that they are, in the sense stated in *Spector*, aspects of such business subject to the sovereign power of the state.

As has been previously outlined, these taxpayers' localized activities within New Jersey are very substantial and their reliance upon and the benefits received from the state government are sizeable and readily apparent. *Cf. National Bellas Hess, Inc.* v. *Illinois*, 386 U. S. 753, 18 L. Ed. 2d 505 (1967). Quite apart from the intangible benefits all businesses receive by reason of the very existence of an orderly state government, a couple of specific things come to mind here as examples of particular benefit. The taxpayers' over-the-road vehicles, registered elsewhere and not paying any license fees to New Jersey, in traveling over two and a half million miles in a year on highways here, must have very considerably utilized toll-free roads constructed and maintained by the state as well as county roads built or improved by state aid distributions. The vehicles and their cargoes were protected by the law enforcement activities of the state police force. The use of the courts necessarily also involved utilization of facilities and services provided by state revenues.

If a *quid pro quo* is thought of as having any bearing, the other taxes Roadway and Pilot paid cannot reasonably be thought of as adequate for the benefits and protection supplied by the state. Local real estate property taxes, imposed on all property owners, go only for local needs and no part thereof finds its way to the state treasury. The registration fees for the city fleet vehicles are not, under our system, moneys dedicated for highway purposes, but go into the general state fund. The

same is true of motor fuel taxes, but these only produce revenue to the extent that a motor vehicle operator chooses to purchase fuel within the state. The so-called payroll taxes cannot be applied for general state purposes, but must become part of special funds only usable to pay unemployment compensation and similar benefits.

The judgments of the Division of Tax Appeals are affirmed.

APPENDIX B

Judgment of Supreme Court of New Jersey

It is hereupon ordered and adjudged that the judgment of the Division of Tax Appeals is affirmed with costs and it is further ordered that the record be remitted to the Division of Tax Appeals to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice.

Judgment Entered December 18, 1967.

Mandate Issued 12-22-67.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX C

Opinion of Division of Tax Appeals

Appearances:

Messrs. McCarter & English by Mr. Nicholas Conover English for the petitioner.

Mr. Arthur J. Sills, Attorney General of New Jersey, by Mr. Alan B. Handler, First Assistant Attorney General, for the respondent.

Kopp, C.

Petitioner, Roadway Express, Inc., appeals from respondent's determination, dated August 29, 1962, imposing corporate business taxes for the years 1946 to 1960, inclusive, pursuant to the Corporation Business Tax Act (1945) N.J.S.A. 54:10A-1 *et seq.*

This appeal was duly assigned to me for hearing and determination. The parties waived a hearing and have submitted the matter upon a detailed stipulation of facts, depositions, interrogatories and briefs.

Originally, petitioner instituted an action in the Superior Court of New Jersey to obtain relief from the said taxes imposed by respondent but that action was dismissed because of the failure of petitioner to exhaust its administrative remedy. This decision was sustained by the New Jersey Supreme Court. *Roadway Express, Inc.* v. *Kingsley,* 37 N. J. 136 (1962). Justice Jacobs, in that opinion, points out that the issue under consideration will "call for careful examination of the true nature of the tax (compare *Railway Express Agency, Inc.* v. *Virginia,* 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757 (1954) and *Railway Express Agency, Inc.* v. *Virginia,* 358 U. S. 434, 79 S. Ct. 411, 3 L. Ed. 2nd 450 (1959) and the detailed facts relating to the properties and activities of the plaintiff within New Jersey.". We shall endeavor to comply with that direction.

Appendix C

Facts

Petitioner is a Delaware corporation organized in 1954 and is the successor in interest to Roadway Express, Inc., a corporation of Ohio, to whose franchises, liabilities and businesses it succeeded in 1954 by a merger. (Both corporations are included in the term "petitioner".) Its home office is in Akron, Ohio and it is engaged in the motor carriage of general commodities under Interstate Commerce Commission Certificate of Convenience and Necessity No. MC 2202 issued to it by the Interstate Commerce Commission of the United States Government pursuant to petitioner's application of January 28, 1936 under Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.* By said Certificate petitioner is authorized to operate as a common carrier by motor vehicle over certain routes indicated on a map which was introduced in evidence as Exhibit P-2.

As of January 1, 1960 petitioner's total route mileage was 29,078 miles and its route mileage in New Jersey was 308 miles. Its total miles traveled in 1960 were 106,751,720 of which 2,578,857 miles were traveled in New Jersey. This latter figure represents only mileage of over-the-road vehicles and does not represent the additional mileage traveled in New Jersey by pickup and delivery vehicles operated from its New Jersey Terminals. Petitioner's operations in New Jersey have generally been of the same type since 1949 but it has expanded in size by virtue of an increased volume of business.

Between 1949 and 1959 petitioner owned and maintained a terminal in Hoboken on a plot of land 200 feet by 200 feet upon which was located an office building and dock facilities. The one-story office building was 70 feet by 30 feet. The dock was 50 feet by 150 feet and there was an addition of 50 feet by 50 feet for undercover spotting of trucks. No garage was included. The entire facility represented an investment of $126,348.48 and was sold in 1959 for $84,000.00.

Appendix C

From 1953 to 1961 petitioner leased at an annual rent of $1800.00 a terminal at Bound Brook, New Jersey, consisting of a plot of land 150 feet by 116 feet on which was located a one-story office building 16 feet by 20 feet. The property contained no dock space, no freight doors and no garage.

In 1959 petitioner opened its terminal in Kearny, New Jersey, on a plot of land consisting of 12.944 acres which it purchased in 1956. This terminal consists of a two-story office building containing 7,338 square feet. It has a dock containing 41,337 square feet and a garage containing 5,900 square feet, both of which structures are one story in height. Petitioner's investment at Kearny amounted to $941,120.00.

Petitioner has not at any time sublet any part of the facilities at Hoboken, Bound Brook and Kearny. Apparently Kearny is its principal place of operation in New Jersey.

About 100 over-the-road tractor-trailers come into the Kearny Terminal in an average week. In addition to this line-haul fleet there is the city fleet of pickup and delivery vehicles. For 1956 it consisted of 34 vehicles, for 1957 it was 40, for 1958 it was 44, for 1959 it was 61, all of which were domiciled at Kearny and were registered, licensed and inspected in New Jersey. In addition petitioner leases automobiles which are designated as company cars and are used by salesmen working out of Kearny. At no time has petitioner rented motor vehicles owned by it to others for use in New Jersey.

Petitioner's Kearny Terminal is managed by a terminal manager, who before July 17, 1960, reported to a district manager at Philadelphia. Since then such manager reported to a district manager in New Jersey which district manager is also responsible for the operations of petitioner's other freight terminals at Philadelphia in Pennsylvania and at Laurel in Maryland. The district manager re-

ports to a vice-presdent in Winston-Salem, North Carolina. None of the petitioner's corporate officers is, or has ever been, located in New Jersey.

In 1960 petitioner had the following employees working at the Kearny Terminal: 1 terminal manager, 1 assistant terminal manager and 1 operations supervisor. Under these supervisory personnel were 1 chief dispatcher, 5 dispatchers, 1 office manager, 1 claim prevention supervisor, 1 sales manager supervising 5 salesmen, and 3 shift supervisors in charge of 6 dock foremen who supervised 55 dock employees. The city fleet was driven by 86 drivers; the garage had 6 employees, and there were 48 clerical employees.

Petitioner's Bound Brook Terminal manager reported for himself and a dispatcher to the same district manager to whom the Kearny manager reported. For administrative purposes he was not under the jurisdiction and authority of the Kearny manager. Operationally, however, the Bound Brook Terminal was regarded as a substation of Kearny, because most of the over-the-road equipment was furnished through Kearny and the Kearny Terminal received less than truckload shipments from Bound Brook for consolidation with Kearny freight moving out. Freight to and from Bound Brook usually moved in truckload lots, and outbound shipments were dispatched directly from Bound Brook without being routed through the Kearny Terminal.

Generally speaking the Hoboken Terminal had served the same freight handling function as the Kearny Terminal but it had no garage.

The Kearny sales staff is responsible for soliciting business in New Jersey and the metropolitan area. Each salesman makes about 50 calls each week explaining petitioner's various services and soliciting business. Petitioner also mails flyers to customers, maintains listings in telephone

directories in New York and parts of New Jersey and advertises in various trade journals. The sales staff submits weekly reports stating the number of calls made, names of customers and potential business. The salesmen share an office in the Kearny Terminal and receive salaries instead of commissions.

Payrolls for all permanent employees of petitioner at its Hoboken, Kearny and Bound Brook terminals were prepared by petitioner's Home Office in Akron, Ohio, from information furnished by the respective terminals and all employees at its New Jersey terminals have been paid by that office by checks drawn on its account in The Firestone Bank in Akron, Ohio.

Except during the year 1954 petitioner has maintained one bank account in a New Jersey bank. Cash receipts collected in New Jersey are deposited in said account and the funds therein are subject to withdrawal only by the Home Office in Akron, Ohio. There is no bank account in New Jersey subject to withdrawal by petitioner's New Jersey employees. Local purchases are paid for by petitioner's New Jersey employees by sight drafts which are accepted by The Firestone Bank in Ohio which is reimbursed therefor by petitioner on a regular and frequent basis. Such drafts are subject to rejection by the Home Office.

Petitioner's Kearny manager maintains a petty cash fund of $350.00 from which he makes periodic disbursements and which fund is replenished by checks drawn on The Firestone Bank in Ohio. This fund is controlled by the Director of General Accounting at the Home Office in Ohio.

Petitioner's city-fleet in New Jersey is inspected, repaired and maintained at its Kearny Terminal. Its long-haul vehicles are serviced there. Although most repairs are made at that garage, local business establishments make

major emergency repairs on a contractual basis to the motors of over-the-road vehicles and non-emergency repairs are generally made at the Home Office in Akron, Ohio. Occasionally worn-out equipment is sold or disposed of by the Kearny Terminal.

As previously stated petitioner's business consists of hauling freight for business customers or other carriers who do not haul to point to which petitioner does haul. Outbound shipments through the Kearny Terminal are generally handled in one of two ways. When a customer located in New Jersey or the metropolitan area requests service, petitioner dispatches a city truck to pick up the freight and bring it to Kearny where it is unloaded on to the dock and then reloaded on a line-haul unit for shipment out of the State. An inbound shipment is handled in the reverse manner.

The other method of operation is for the customer to deliver the freight directly to the Kearny Terminal for shipment out of New Jersey or the customer receiving goods may pick up the shipment at the Kearny Terminal. In such instances the customer, if he requests it, is given an allowance in the form of a refund.

In no instance has petitioner carried freight shipped by a customer located in New Jersey to a destination in New Jersey. Much of the freight handled at the Kearny Terminal comes from the New York metropolitan area for destinations outside of New Jersey, or goes to that area from origins outside of New Jersey.

Petitioner's operations through its New Jersey terminals produce substantial revenues. In 1958, before the Kearny Terminal began operating, charges to shippers for freight originating in New Jersey amounted to $4,026,944.20, and charges to shippers for goods delivered to points in New Jersey amounted to $3,796,275.80, making the total revenue

derived from activities in New Jersey for that year $7,823,220.00. In 1960 petitioner's total gross revenue was $71,380,270.00 of which $5,728,214.00 was derived from its New Jersey operations. Although the foregoing figures include revenue from freight collected from or delivered to the New York area, the greater portion of the freight originated in New Jersey and all of such freight was handled in New Jersey at some time during the shipment.

In 1958 petitioner's average deposits in New Jersey banks were $154,238.00 and it paid to New Jersey businessmen for local purchases $258,390.86. During the same year it paid New Jersey real estate, motor vehicle, motor fuel, payroll and other taxes amounting to $36,876.00. In 1959 these taxes amounted to $88,068.00 and in 1960 they amounted to $89,943.00.

Although petitioner has never been authorized, or made application to be authorized, to do business in New Jersey as provided by N.J.S.A. 14:15-3 it has nevertheless used the New Jersey courts to enforce claims or defend claims against it and has engaged in substantial business dealings in New Jersey.

ISSUE

Petitioner has never paid without protest any tax under the Corporation Business Tax Act of 1945, N.J.S.A. 54:10A-1 *et seq.* because it contends that it is solely engaged in interstate commerce, that said tax is a *bona fide* franchise tax and that under the Commerce Clause of the Constitution of the United States, Art. I, Sec. 8, cl. 3, the State of New Jersey is prohibited from imposing such a tax upon it. It is not argued that N.J.S.A. 54:10A-1 *et seq.* is unconstitutional on its face, but instead it urges that respondent's application of said Act to petitioner is unconstitutional. No doubt, therefore, arises as to the jurisdiction of the Division of Tax Appeals to determine the issue.

Appendix C

Respondent argues that the Corporation Business Tax Act (1945) by its terms and essential purposes is a tax imposed by the State of New Jersey upon corporations "for the privilege of having or exercising its corporate franchise in the State of New Jersey, or for the privilege of doing business, employing or owning capital or property or maintaining an office" in this State. Said tax, referred to generally as "a franchise tax" is "in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business" by subject corporations. Therefore, said tax is not one imposed solely for the privilege of doing business and the payment of it is not a condition precedent to the doing of business by a corporation in this State. Consequently the imposition of that tax does not constitute an impermissible regulation or burden upon a corporation engaged in interstate commerce under the Commerce Clause of the Constitution of the United States.

Respondent further contends that the contracts and operations of petitioner in New Jersey are so extensive and substantial that, for the purposes of the Corporation Business Tax Act (1945), the petitioner may be deemed to be doing a taxable business in the State of New Jersey without regard to its relationship to its over-all interstate business.

Question

May the tax provided for under the Corporation Business Tax Act (1945) N.J.S.A. 54:10A-1 *et seq.* be constitutionally applied to petitioner?

Nature of the Tax

The section of the Corporation Business Tax Act (1945) which imposes the tax N.J.S.A. 54:10A-2 provides:

> "Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual fran-

chise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act."

Throughout the other sections of the Act the tax is referred to as a franchise tax. The regulations promulgated by respondent also refer to the tax as a franchise tax. It has been so described in *Werner Machine Co.* v. *Director, Division of Taxation,* 17 N. J. 121 (1954) aff'd 350 U. S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956); *United States Steel Corp.* v. *Director, Division of Taxation,* 38 N. J. 533 (1962) and *F. W. Woolworth Co.* v. *Director, Division of Taxation,* 45 N. J. 466 (1965). It can be conceded that petitioner's contention that the tax is a "bona fide franchise tax" is entirely correct and respondent so concedes. Respondent, however, points out that the label is not in itself meaningful. What is crucial is the nature of the franchise tax because franchise taxes *per se* are not proscribed by the Commerce Clause of the Federal Constitution when applied to those engaged in interstate commerce.

The most important indication of the nature of this franchise tax is found in the words of the statute itself. It is imposed "for the privilege of having *or* exercising its corporate franchise in this State, *or* for the privilege of doing business, employing *or* owning capital *or* property, *or* maintaining an office in this State.". The word "or" is emphasized to show clearly that the tax is imposed because of several alternative privileges. Further, it is imposed only

when at least one of these privileges is exercised by a taxpayer doing business in the corporate form.

A further aspect of the tax so imposed is that it is "in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.".

The language of the provisions of the Corporation Business Tax Act (1955) clearly indicates that the tax imposed thereunder is not imposed solely upon the privilege of doing business in the state or the right to do business in the state.

DISCUSSION

Petitioner relies heavily upon the decision of the United States Supreme Court in the case of *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951). Petitioner's method of operation of its business in New Jersey is almost identical to that of Spector Motor Service, Inc., in Connecticut. The tax levied by the State of Connecticut on Spector is as follows:

> "Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and *every other corporation or association, carrying on business in this state which is required to report to the collector of internal revenue* for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax (with exceptions not material here * * * *shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state,* such tax to be measured by the entire net income as herein defined received by such corpora-

tion or association from business transacted within the statee during the income year and to be assessed at the rate of two per cent; * * *." (Emphasis supplied.) Conn. Gen. Stat. Cum. Supp. 1935.

This section was amended in 1937 by inserting in the first italicized clause, after the words *"every other corporation or association carrying on,"* the words *"or having the right to carry on"*. Conn. Gen. Stat. Cum. Supp. 1939, § 354e. Our conclusion is the same as to the assessments levied before and those levied after the amendment.

The current revision of the statute, as subsequently amended, appears in Conn. Gen. Stat. 1949, §§ 1896-1921.

(The foregoing is the footnote including emphasizing to the Spector decision and, therefore, represents the tax statute as ruled upon by the U. S. Supreme Court in that case.)

A brief statement of the litigation leading up to the decision of the U. S. Supreme Court in this case is important to a clear understanding of this case. Spector first instituted an action in the District Court for the District of Connecticut. That Court took jurisdiction and held that the Act did not apply to Spector. On appeal to the Court of Appeals for the Second Circuit that Court in 139 F. 2nd 809 held that the tax did apply to Spector and was constitutional. The U. S. Supreme Court granted certiorari, but, after hearing, remanded the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought in the state court in conformity with the opinion rendered in 323 U. S. 102, 65 S. Ct. 159, 89 L. Ed. 101. In that opinion the court pointed out the numerous questions to be answered in determining whether

or not Connecticut properly and legally taxed Spector, noting that many of the questions should be first answered by the state courts. It then said:

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against petitioner. But even if the statute hits aspects of an exclusively interstate business; it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

Pursuant to that remand Spector instituted an appropriate action in the state courts and the Supreme Court of Errors of the State of Connecticut held that "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign." It held that the tax applied to Spector.

The District Court enjoined the collection of the tax and the Circuit Court of Appeals again reversed. Thus the matter returned to the U. S. Supreme Court which held the tax to be invalid, saying:

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise

of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. These taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the power of the State and nondiscriminatory."

Three Justices dissented and voted to affirm the judgment below. Justice Clark said:

"The Court assumes, and I think it has been clearly demonstrated, that the tax under challenge is non-discriminatory, fairly apportioned and not an undue burden on interstate commerce. Hence, if an appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce.

"But solely because Spector engages in what the Court calls 'exclusively interstate' business, a different standard is applied. The Court does not ask whether the State is merely asking interstate commerce to pay its way, or whether the State in fact provides protection and services for which such commerce may fairly be charged. Nor is the Court concerned whether the tax puts interstate business at a competitive disadvantage or is likely to do so.

> Instead the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one for the use of highways or in lieu of an ad valorum property tax, Spector would have to pay the same amount calculated in the same way, as is sought to be collected here. In acknowledging this, the Court's own opinion totally refutes its protestation that the standard employed to strike down Connecticut's tax is more than a matter of labels. * * *"

It is, of course, recognized that dissenting opinions are per se of small value in determining what the law is, but they often shed light on the subtle thinking of the court as revealed by the debate among the members of the court, particularly in a field of law such as taxation where the decisions of our highest court in the nation do not necessarily lead to enunciations of principles which are clear to the ordinary mind.

The Spector case was decided in 1951. In 1954 the United States Supreme Court in the case of *Railway Express Agency* v. *Commonwealth of Va.*, 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757 (1954) declared invalid a tax of that State imposed upon an express company engaged solely in interstate commerce because it analyzed the imposed tax to be a "privilege tax" violative of the Commerce Clause of the Federal Constitution. It held that the assessment was laid on Railway's "privilege of doing business" in Virginia. After determining the dollar effect of the tax levied upon Railway, the Court said:

> "We have sustained and would now sustain the power of a state to tax, without discrimination, all

property within its jurisdiction and to include in its assessments, or to assess separately the value added by the property's assemblage into a going business, even if that business be solely interstate commerce. *Cf. Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445; *Baker* v. *Druesedow*, 263 U. S. 137, 44 S. Ct. 40, 68 L. Ed. 212; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 17 S. Ct. 604, 41 L. Ed. 965. The impact of the tax is thus upon the proportionate total worth of the property. But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. *Cf. United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328-329, 38 S. Ct. 499, 501, 62 L. Ed. 1135."

Once again there was a strong dissent. This time by four Justices who contended that even using the principle of *Spector* the tax should be held to be valid.

Five years later the effort of Virginia to require Railway to bear some of the cost of a government which it enjoyed came before the United States Supreme Court in the case of *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 79 S. Ct. 411, 3 L. Ed. 2nd 450 (1959). In the period between the former case and the later case Virginia

had enacted an Act levying a "franchise tax" on express companies, measured by gross receipts from operations within Virginia, in lieu of all other property taxes on intangibles and rolling stock. This tax was held to be valid even though imposed upon a corporation exclusively engaged in interstate commerce. In distinguishing the new tax from the former tax the Court said:

> "First, let us clear away the dead underbrush of the old law. The new tax is not denominated a license tax laid on the 'privilege of doing business in Virginia'; nor is it 'in addition to the property tax' levied against appellant, nor a condition precedent to its engaging in interstate commerce in the Commonwealth. The General Assembly has made crystal-clear that the tax is now a franchise tax laid on the intangible property of appellant, and is levied 'in lieu of taxes upon all of its other intangible property and * * * rolling stock'. The measure of the tax is on gross receipts, fairly apportioned, and, as to appellant is laid only on those 'derived from the transportation within this State of express transported through, into, or out of this state'."

The Court stated the question to be answered as follows:

> "* * * Our sole question under the Commerce Clause is whether the tax in practical operation is on property or privilege."

In holding that the tax as levied was not violative of the Commerce Clause the Court said:

> "As we have pointed out, the statute levies a franchise tax in lieu of all taxes on '*other* intangible property' and rolling stock (Emphasis added by Court) this leaves no room for doubt that the Gen-

eral Assembly intended to levy a tax upon appellant's intangibles. Moreover, supporting this interpretation, both the State Commission and the Supreme Court of Appeals have construed it as a tax on appellant's intangible property and 'going concern' value. This trinity of agreement by three state agencies, though not conclusive, has great weight in our determination of the natural and reasonable effect of the statute."

The court then held that the tax was valid as a property tax. One Justice concurred without opinion, but Justice Brennan filed a concurring opinion in which he stated that he had some reservation that the tax could "fairly be thought of as property tax", but rather he thought "the more realistic way of viewing the tax and evaluating its constitutional validity is to take it as what it is in substance, a levy on gross receipts fairly apportionable to the taxing State." He further said:

"* * * This Court's decisions sustain the application of a fairly apportioned gross receipts tax to an interstate transportation company. *Canton R. Co.* v. *Rogan,* 340 U. S. 511, 515-516, 71 S. Ct. 447, 449, 95 L. Ed. 488; *Central Greyhound Lines, Inc. of New York* v. *Mealey,* 334 U. S. 653, 663-664, 68 S. Ct. 1260, 1266-1267, 92 L. Ed. 1633. Cf. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256, 58 S. Ct. 546, 549, 82 L. Ed. 823. In my view, the most compelling reason for affirming the judgment of the Supreme Court of Appeals of Virginia is the application of these principles here."

Justice Harlan concurred with Justice Brennan with a short explanatory opinion.

Appendix C

On the same day that the U. S. Supreme Court decided the foregoing case it decided the cases of *N. W. States Portland Cement Co. v. State of Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357 in which it held that the net income from the interstate operations of a foreign corporation may be subjected to state taxation provided that the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same, and that the imposition of such tax did not violate the Commerce Clause or the Due Process Clause of the Federal Constitution.

There are a great many decisions of the United States Supreme Court dealing with the vexing and complicated question of the right of the states to tax foreign corporations engaged in interstate commerce. No case has been cited, nor has any case been discovered by us, which passes on the validity of a statute precisely the same as N.J.S.A. 54:10A-1 *et seq.* when applied to a corporation engaged "exclusively in interstate commerce". Certainly the tax here imposed on petitioner is unlike the tax imposed in the *Spector* case (*supra*) or in the first *Railway-Virginia* case (*supra*) or even the second *Railway-Virginia* case (*supra*). The income tax phase of the New Jersey Business Corporation Act is comparable to the tax sustained in the *Portland Cement Co.* case (*supra*).

Conclusion

Careful analysis of each of the foregoing cases and of all the cases cited therein together with the numerous cases cited by the parties herein has not led this Division to the conclusion that the tax imposed on petitioner herein is in violation of the Commerce Clause of the Constitution of the United States.

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Petitioner contends that it is a "bona fide franchise tax" hence it must fall, but it is clear from the foregoing cases that that label in itself does not render the tax invalid under the Commerce Clause. On the other hand respondent argues that it is a tax imposed for the privilege of operating in New Jersey in the corporate form, but this is no different than the tax which was stricken in *Suector* (*supra*). Indeed, if respondent applied the statute solely on that incidence of taxation, it must fall.

Respondent obviously did not so apply the Statute. On the contrary it is apparent, and the facts make it abundantly clear, that petitioner employs capital, owns substantial property and maintains offices within this State; that it enjoys to a marked degree the varied services of this State; that as a result thereof its income from its interstate business is substantially increased and that although all its activities are related to and integrated with its interstate business, nevertheless, its business activities within New Jersey are such as to fairly require it to pay its just share of the cost of state government. Respondent evidently applied the statute to petitioner because of these aspects of its New Jersey operations.

This Division concludes from its study of the statutes and decisional law that a sovereign state may levy a tax, measured by the net worth and net income of a corporation, upon all corporations which engage in business within its borders and which employ capital and own property and maintain offices here, where such tax is in lieu of all other state, county or local taxation upon or measured by intangible personal property; provided such tax is nondiscriminatory, is fairly apportioned and does not impose an undue burden on interstate commerce.

We hold that respondent has properly applied the tax in question upon petitioner and since petitioner has not con-

tended that the tax is discriminatory or unfairly apportioned, we find that the tax as computed by respondent is non-discriminatory and fairly apportioned so as to require petitioner to pay only its fair and just share of the cost of the state government which it uses in a substantial manner for its financial benefit.

By this holding, we certainly do not imply that respondent can constitutionally impose this tax upon a corporation simply because it exercises its right to engage in interstate commerce in this State.

The action of respondent in imposing the tax in question is sustained.

Dated: December 20, 1965.

APPENDIX D

Petition of Appeal

Petitioner, Roadway Express, Inc., a corporation of the State of Delaware, having its principal office at 147 Park Street (P. O. Box 471), Akron 9, Ohio, says that:

1. Petitioner is a corporation duly organized in 1954 under the laws of the State of Delaware.

2. Petitioner is the successor in interest to Roadway Express, Inc., a corporation of the State of Ohio, to whose franchises and businesses it succeeded in 1954.

3. Petitioner is, and at all material times has been, a common carrier of general freight by motor vehicles, pursuant to Certificate of Convenience and Necessity No. MC 2202 to petitioner by the Interstate Commerce Commission of the United States Government.

4. Any and all business conducted by petitioner during the years 1946 to 1960, inclusive, was exclusively in interstate commerce.

5. Said Certificate No. MC 2202 restricts petitioner's business to interstate commerce. Petitioner has not been authorized by the State of New Jersey to do intrastate trucking and does not engage in it.

6. Petitioner does not, and during the years 1946 to 1960, inclusive, did not, engage in any hauls which both originate and terminate in the State of New Jersey.

7. Prior to 1958 petitioner owned a terminal in Hoboken, New Jersey. In the year 1958 petitioner sold its Hoboken terminal and acquired as owner a terminal in Kearny, New Jersey, which it has since used. Between 1953 and 1960

plaintiff used the terminal which it leased at Bound Brook, New Jersey. All of the aforesaid terminals were used exclusively in connection with petitioner's interstate activities.

8. By determination dated August 29, 1962, the Director of the Division of Taxation has assessed against petitioner the corporation franchise or business tax enacted in P. L. 1945, Chapter 62, R.S. 54:10A-1 et seq., for the years 1946 to 1960, inclusive.

9. Said determination is unlawful and erroneous for the following reasons:

(a) All of the business conducted by petitioner or its predecessor in the State of New Jersey is and at all times has been exclusively in interstate commerce.

(b) By virtue of the Commerce Clause of the Federal Constitution, Art. I, §8, Cl. 3, the State of New Jersey has no power to impose upon petitioner the said corporation business or franchise tax.

(c) The Director of the Division of Taxation lacks authority to impose upon or collect from petitioner the taxes as set forth in the aforesaid determination dated August 29, 1962.

10. Petitioner has paid, under protest, the aforesaid taxes unlawfully assessed against it by the Director of the Division of Taxation.

WHEREFORE, petitioner demands that:

A. The determination of the Director of the Division of Taxation, dated August 29, 1962, be set aside.

B. A decision be rendered that petitioner or its predecessor has been engaged solely in interstate commerce.

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C. Petitioner is not liable for New Jersey corporation business or franchise taxes for the years 1946 to 1960, inclusive.

D. The taxes paid by petitioner, under protest, be returned to it, together with lawful interest.

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APPENDIX E

Stipulation of Facts

The petitioner, Roadway Express, Inc., and the defendant, Director of Division of Taxation, acting through their respective attorneys, have entered into the following stipulation of facts for purposes of the above entitled appeal. This stipulation is entered into without prejudice to the right of either party to object to the materiality of any facts stated herein or to offer additional evidence or testimony. In general, the nature of the business which petitioner has carried on in New Jersey has been the same for each year for the 1946-1960 period, although the volume and size of the operation have grown over the years. Unless the context specifically indicates otherwise, the following stipulations apply to the kinds of activities petitioner has carried on in New Jersey during each of the years in question.

1. Petitioner is a corporation duly organized in 1954 under the laws of the state of Delaware.

2. Petitioner is the successor in interest to Roadway Express, Inc., a corporation of the State of Ohio, to whose franchises, liabilities and businesses it succeeded in 1954 by a merger. The term "petitioner" as used in this stipulation will be deemed to apply to the predecessor corporation wherever the context so indicates.

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3. Petitioner is, and at all material times, has been solely a common carrier of general freight by motor vehicle.

4. Since 1950 petitioner has been the holder of Certificate of Convenience and Necessity No. MC 2202 issued to it by the Interstate Commerce Commission of the United States Government pursuant to its application of January 28, 1936, under Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 et seq. Said Certificate No. MC 2202 is hereby offered as Exhibit P-1.

5. Said Certificate of Convenience and Necessity No. MC 2202 authorizes petitioner to operate as a common carrier by motor vehicle over the routes indicated on a map hereby offered as Exhibit P-2.

6. Petitioner's total route mileage as of January 1, 1960, according to Exhibits P-1 and P-2, was 29,078 miles and its route mileage in New Jersey was 308 miles. Its total miles traveled in 1960 were 106,751,720 miles, of which 2,578,857 miles were traveled in New Jersey that year. These figures are for over-the-road vehicles and do not refer to mileage by pickup and delivery trucks within the state of New Jersey. The total miles traveled by pickup and delivery vehicles, over petitioner's entire system, average about 8% of over-the-road miles traveled.

7. Petitioner's total gross revenue in 1960 was $717,380,270.00. Its gross revenue for freight originating in New Jersey, as explained in paragraphs 9 and 10 below, and also for freight originating outside of New Jersey from

the New York metropolitan area, as covered by paragraph 15 below, was $5,728,214.00.

8. The freight which petitioner carries consists of general commodities except: Livestock, articles of unusual value, dangerous explosives, commodities in bulk; commodities requiring special equipment, and household goods other than those that are crated and boxed. The general nature of the shippers is industrial.

9. Petitioner carries freight from New Jersey to destinations outside the state. Freight originating in New Jersey is usually picked up by petitioner at the point of origin. On occasion freight may be received at petitioner's New Jersey terminals from shippers, cartage agents or other trucking companies.

10. Petitioner accepts freight originating in New Jersey in lots less than the capacity of a full over-the-road truck. An over-the-road truck is always a tractor-trailer. This freight is collected by petitioner in trucks owned or leased by it and operated by it.

11. After collecting less than truckload lots, petitioner ordinarily transfers such freight to other trucks owned by it for out of state shipment. The transfer is made at petitioner's terminal at Kearny, New Jersey, and consists of moving the freight from so-called "city trucks" (or pick-up and delivery trucks) to over-the-road trucks or trailers. In exceptional cases such freight is picked up directly in an over-the-road trailer and is carried to a destination outside of New Jersey without being transferred at the terminal. Freight is retained on the dock at petitioner's Kearny Terminal only for such time as may be required to facilitate loading.

12. Petitioner does not crate or otherwise prepare for shipment freight originating in New Jersey. Damaged crates or packages are usually repaired to prevent further damage in transit, but petitioner has no special facilities for this purpose.

13. Petitioner carries freight to New Jersey destinations from points outside of the state. The nature of the commodities and shippers is the same as described in paragraph 8 of this stipulation.

14. Petitioner accepts at places outside of New Jersey less than truckload shipments of freight destined for New Jersey. It delivers less than truckload shipments from its Kearny, New Jersey Terminal to addresses in New Jersey and in metropolitan New York. Ordinarily this freight is transferred at petitioner's Kearny Terminal dock from over-the-road vehicles to city trucks for delivery, although over-the-road vehicles occasionally consummate the delivery.

15. Petitioner's Kearny Terminal in New Jersey is not used for the shipment of freight which both originates and finally terminates wholly within the state of New Jersey. Much of the petitioner's freight handled at the Kearny terminal comes from the New York metropolitan area for destinations outside of New Jersey, or goes to the New York metropolitan area from origins outside of New Jersey.

16. In 1946 petitioner purchased land at Hoboken, New Jersey, on which it completed a terminal in April, 1947. This terminal was sold in October, 1959. Petitioner purchased land in Kearny, New Jersey, in July, 1956 upon which the construction of a new terminal was subsequently initiated with completion in early 1959. The Hoboken

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Terminal was located on a plot 200′ x 200′. The terminal consisted of an office building and dock facilities. The office building was one story in height. Its dimensions were 70′ x 30′, consisting of 2100 square feet. The dock was 50′ x 150′ and there was an addition of 50′ x 50′ for undercover spotting of trucks. The entire unit had 28 doors. This facility did not include a garage.

17. Petitioner's Kearny, New Jersey Terminal is built on a plot consisting of 12.944 acres. The terminal consists of a two-story office containing 7,338 square feet. The dock contains 41,377 square feet. It is one story in height, about 101′ wide and 409′ long. Also located on the plot in Kearny is a garage 60′ x 99′, one story in height, and containing 5,900 square feet.

18. From March, 1953 to April, 1961 petitioner leased a terminal at Bound Brook, New Jersey. The property consisted of a lot 150′ x 116′, on which was located a one-story office building 16′ x 20′. The property contained no dock space, no freight doors or other dock facilities, nor garage.

19. At no time has petitioner ever sublet any space in its Hoboken, Kearny or Bound Brook terminals.

20. Petitioner has never purchased motor vehicles in New Jersey, nor sold motor vehicles to purchasers in New Jersey at the end of their usefulness to petitioner.

21. Petitioner had no garage in New Jersey prior to 1959. Prior to 1959 the servicing, maintenance and repair of petitioner's vehicles was done by contract with local garages in the vicinity of Hoboken. Since 1959 petitioner has serviced and made repairs at the Kearny Terminal on its pickup and delivery vehicles operating in New Jersey.

The servicing consists of supplying oil, grease, fuel, and motor and body repairs. Major repairs, on pickup and delivery vehicles, such as engine overhaul, are made by the manufacturers' representatives who specialize in the work. Purchases for the garage at Kearny are made at petitioner's Home Office in Akron, Ohio and then shipped to Kearny from Akron inventory. Such purchases consist generally of tires, small parts, lubricants, tools and the like. Fuel stored on the premises at Kearny is bought from suppliers designated by, and at prices determined by, petitioner's Home Office in Akron, Ohio. Occasional purchases of other garage supplies at predetermined prices are made by the Kearny garage manager at local vendors named by petitioner's Director of Purchasing at its Home Office in Akron.

22. With respect to units of petitioner's over-the-road truck fleet which come to Kearny from cities outside of New Jersey, petitioner's garage at Kearny makes checks for road safety and makes such minor repairs, or adds oil, as may be indicated. Major emergency repairs to the motors of these trucks are made locally by manufacturers' representatives. All major work, except that of an emergency nature, is done at petitioner's garages in Akron and Cincinnati, Ohio, Winston-Salem, North Carolina, St. Louis, Missouri, and Dallas, Texas, where the over-the-road equipment is domiciled and garaged.

23. The number of trucks owned or leased by petitioner and permanently garaged in New Jersey is unknown for years prior to 1956. The number of trucks permanently garaged in New Jersey was: For 1956 it was 34; for 1957 it was 40; for 1958 it was 44; and for 1959 it was 61. These were all city, or pickup and delivery trucks, and all were registered in New Jersey.

24. At no time has petitioner rented motor vehicles owned by it, whether kept or garaged in New Jersey or elsewhere, to any other party for use in New Jersey.

25. Petitioner has regularly obtained New Jersey licenses or registrations for its city or pickup and delivery trucks which regularly operate out of its New Jersey terminals.

26. Petitioner's Kearny Terminal is managed by a terminal manager, who before July 17, 1960, reported to a district manager at Philadelphia. Since then the manager of petitioner's Kearny Terminal has reported to a district manager, whose office has been located at petitioner's New Jersey Terminal, and who is responsible for the operations of petitioner's other freight terminals at Philadelphia and at Laurel, Maryland. The district manager reports to a vice president of petitioner, who is located at Winston-Salem, North Carolina. None of petitioner's corporate officers is, or has ever been, located in New Jersey.

27. Petitioner's Bound Brook Terminal manager reported for himself and a dispatcher to the same district manager to whom the Kearny manager reported. For administrative purposes he was not under the jurisdiction and authority of the Kearny Terminal manager. Operationally, the Bound Brook Terminal was regarded as a substation of Kearny, because most of the over-the-road equipment was furnished through Kearny Terminal, and the Kearny Terminal also received less than truckload shipments from Bound Brook for consolidation with Kearny freight moving outbound. Freight to and from Bound Brook usually moved in truckload lots, and on outbound shipments was dispatched directly from Bound Brook without routing through Kearny.

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28. Generally speaking, the Hoboken Terminals had served the same freight handling functions as the Kearny Terminal, but had no garage.

29. For the year 1960 petitioner maintained at its Kearny Terminal one terminal manager, one assistant terminal manager, and one operation's supervisor. Under these supervisory employees worked one chief dispatcher, who was responsible for 5 other dispatchers, an office manager, who was responsible for office routine, a claim prevention supervisor and engineer, a sales manager and 5 salesmen, and 3 shift supervisors for the dock who, in turn, supervised 6 dock foremen, who were responsible for 55 dock employees. In addition to the above, in 1960 petitioner on the average employed 86 pickup and delivery truck drivers, 6 garage employees, and 48 clerical employees.

30. Payrolls for all permanent employees of petitioner at its Hoboken, Kearny and Bound Brook terminals were prepared by petitioner's Home Office in Akron, Ohio, from information supplied by the respective terminals.

31. All of petitioner's employees at its New Jersey terminals have been paid by petitioner's Home Office in Akron, Ohio by means of checks drawn on The Firestone Bank, Akron, Ohio.

32. Except during the year 1954, petitioner has maintained one bank account in a New Jersey bank, namely, the First National Bank of Jersey City. Cash receipts collected at the New Jersey terminals have been deposited in said New Jersey bank account. Funds from the New Jersey bank account may be withdrawn only by petitioner's Home Office in Akron, Ohio. There is no bank account in New Jersey subject to withdrawal by petitioner's New Jersey employees. Petitioner's New Jersey employees

make payment of local purchases by sight draft, which is accepted for payment by The Firestone Bank in Akron, Ohio, and which is reimbursed by petitioner on a regular and frequent basis. Drafts can be rejected by the Home Office at Akron, Ohio.

33. Petitioner's Kearny, New Jersey Terminal maintains a petty cash fund in the constant amount of $350.00. The fund is in the hands of the Kearny Terminal Manager who makes periodic disbursements. The fund is replenished by checks drawn on the Firestone Bank in Akron, Ohio, and the fun itself is controlled by Mr. G. W. Winters, who is Director of General Accounting, for the petitioner at its Home Office in Akron, Ohio.

34. Following is a list of the various kinds of clerks employed at petitioner's Kearny Terminal and their functions, as supervised by the Office Manager:

(a) Switchboard operators, city dispatchers, and city dispatch clerk receive telephone calls from customers and direct trucks to pick up freight.

(b) Tally clerks check freight off local city or pickup trucks to the platform, and into over-the-road trailers.

(c) Rating and billing clerks prepare and distribute freight bills, nine-part forms used in the various freight handling functions. The distribution includes forwarding all control copies to petitioner's General Accounting Department, Akron, Ohio.

(d) Manifest clerk writes a list of freight bills carried on each outbound over-the-road trailer.

(e) O.S. & D. (over, short and damaged) and Tracing clerks check to locate over, short or damaged freight, and to route it to a proper destination.

(f) Time clerk checks time cards of employees daily, and forwards them weekly to General Accounting Department, Akron, Ohio for use in preparation and disbursement of pay checks.

(g) Line haul (over-the-road) dispatch clerk prepares and issues line haul (over-the-road) drivers' trip instructions.

(h) Cashier checks out freight bills to driver on freight for local, inbound delivery at start of day, and checks in driver at end of day. About 17% of such deliveries are paid for in Kearny by the customer to the driver at the time of delivery, and such currency is turned over by the driver to the cashier. The cashier actually deposits the cash receipts in petitioner's New Jersey bank account in the First National Bank of Jersey City, and also prepares a cash report and a duplicate deposit slip which is forwarded daily to petitioner's General Accounting Department, Akron, Ohio.

35. During the years 1949 through 1958, petitioner did not advertise in newspapers or magazines in New Jersey. However, petitioner did maintain a listing in the Yellow Pages of the telephone book; it did employ salesmen in New Jersey, who kept customers aware of petitioner's services and did solicit business; and petitioner has distributed informational fliers and maps to shippers to acquaint them with petitioner's routes and services.

36. For a 10-year period, the New Jersey taxes paid by petitioner are as follows:

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New Jersey Taxes	*1951*	*1952*	*1953*	*1954*	*1955*
Real Estate	$6,668	$8,256	$4,973	$5,289	$5,192
*Vehicle Taxes	*177	*344	*229	*21	*
Fuel	1,866	1,884	1,346	86	120
Payroll	3,749	3,490	4,852	5,252	5,406
Other	120	614		877	1,864
	$12,580	$14,588	$11,400	$11,525	$12,582

	1956	*1957*	*1958*	*1959*	*1960*
Real Estate	$7,766	$5,444	$7,018	$43,024	$32,044
*Vehicle Taxes	2,631	3,054	5,850	10,824	13,473
Fuel	6,026	9,258	11,765	16,945	23,907
Payroll	7,844	8,335	9,879	14,169	18,448
Other	1,779	2,403	2,364	3,106	2,071
	$26,046	$30,494	$36,876	$88,068	$89,943

37. Petitioner has filed corporation franchise business tax returns, under protest, for the years 1949 to 1960. All figures shown on said returns are accepted as accurate, and there is no dispute as to the amount of the taxes, assuming liability is established, for the years in question. Petitioner has fully discharged its liability for taxes as shown on said returns. The said returns may be marked in evidence as exhibits.

38. Petitioner has never made an application for authorization to do business in New Jersey under the provisions

* Leased units. Licensing and fuel taxes paid by lessor and are not reflected here.

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of Title 14, Chapter 15 of the Revised Statutes of New Jersey.

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